No. 16164

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division

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BRIEF OF THE BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION.

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Statement.

The statement contained in appellant's brief, page 4, covering "b, the Bank of America Case" is substantially correct. However, appellee wishes to point out that the seven checks involved in the *Bank of America* case, contrary to appellant's statement, were not issued to seven different fictitious or non-existing payees but were issued to one or more actual living beings who used assumed names [R. 19-20].

Summary of Argument.

The appellant in its brief relies heavily in support of its argument that *National Metropolitan Bank v. United States,* 323 U. S. 454 (1945) and related cases are controlling.

Appellee will show under Point I that the *National Metropolitan Bank* case and related cases have no application to the facts of the case at bar in that those cases are all concerned with a situation in which there is an admitted forgery and the results which follow therefrom. They have nothing to do with the impostor rule which is involved in the present case and in which the issue is whether or not there was a forgery.

Appellee will show that the argument of appellant to the effect that the policy of the *National Metropolitan Bank* case should be applied in this case is erroneous because appellant's argument is premised on a basic but erroneous assumption that this is a forgery case and the Government refuses to recognize the difference between a forgery and an impostor case and persists in its false assumption that the endorsements involved in this case are forgeries. The Government, in erroneously assuming the very issue presented, thus begs the entire issue.

The Supreme Court on two occasions, as will be shown in the argument, has accepted the impostor rule as a matter of Federal law in two cases indistinguishable from the case at bar.

In Point II, we will show how the impostor rule is applicable to the case at bar and that the facts present the classic case for the application of the rule.

The case of *United States v. Continental American Bank and Trust Co.,* 175 F. 2d 271 (C. A. 5, 1949), certiorari denied, 338 U. S. 870 (1949), is on all fours with the case at bar and applied the impostor rule as a matter of Federal law, deciding the bank was not liable.

The doctrine of actual or dominant intent is the correct basis for application of the impostor rule. The drawer of a check in issuing a check intends that some physical person, not just a name, receive and endorse the check. The drawer in dealing with an impostor, although he does not know him as such, intends that the person with whom he deals is the one who is entitled to the check and the bank in cashing the check merely carries out the intent of the drawer. That is the factual situation existing in the case at bar.

ARGUMENT.

Before answering the argument of appellant, appellee believes that it is apropos, at this point, to set forth what it believes to be the only issue involved in this case.

It is appellee's contention that the only issue is whether or not the present case presents a factual situation which calls for the application of the doctrine of the impostor rule.

It is our contention that the factual situation involved herein, as per the stipulation of facts [R. 14-17], presents the classic situation for the application of the doctrine, that the lower court was correct in concluding as a matter of law that the impostor rule applied and the en-

dorsements of the payees' names on the checks were not forgeries.

The impostor rule is succinctly set forth at page 118 in the case of *Atlantic National Bank of Jacksonville v. United States,* 250 F. 2d 114 (C. A. 5, 1957):

> "'* * * where the drawer of a check has dealings with an impostor who assumes a false name, and the check is intended for the person with whom the drawer is dealing, payment of the check by the bank to such impostor or on his endorsement will be authorized and binding upon the * * *' drawer, 7 Amer. Jur., Banks, §599."

In the instant case, all the essential elements compelling the application of the doctrine are present:

1. Dealings between the impostor and the Government by filing the income tax return with name and address thereon of the purported tax payer.

2. The fraudulent representation that a refund is due to the person named.

3. The issuance of the check in the name shown on the return and delivery of said check to the address shown on the return.

4. The receipt by the physical person filing the return of the check.

5. The endorsement of the check by the physical person who filed the return and to whom the check was mailed.

I.

The Rule of National Metropolitan Bank v. United States, 323 U. S. 454, Has No Application to the Facts of the Case at Bar and Is Not Controlling.

A. The National Metropolitan Bank and Related Cases Involve Admitted Forged Endorsements.

Appellant in arguing for a reversal of the lower court relies almost entirely on the decision in *National Metropolitan Bank v. United States,* 323 U. S. 454 (1945), and related cases.

The *National Metropolitan Bank* case did not involve the impostor rule. The impostor rule was not even discussed in the case. It was a case of out-and-out forgery. Appellee has no argument with appellant as to what the law is where there is an admitted forgery. In the instant case, we do not have an admitted forgery and for the appellant to argue and cite in support of forgery cases is merely to beg the question.

In the *National Metropolitan Bank* case, one Foley, a civilian clerk in the paymaster's office of the Marine Corps falsely procured from the disbursing officer checks payable to living marine officers. These checks were delivered to Foley for the purpose of having him distribute them to the named officers. Instead of distributing them to the named officers, Foley forged the endorsements of the named payees and then added his own endorsement. He did not deliver them to the payees as it was his duty to do, but forged their names and cashed them. He had never presented himself or represented himself as the person entitled and persuaded the drawer of the checks that he

was entitled to be paid. He was not an impostor but a forger.

This court, in the case of *Security-First National Bank of Los Angeles v. United States*, 103 F. 2d 188 (C. A. 9, 1939), a case in its essential facts on all fours with the case at bar, at page 190, in discussing the impostor rule, said:

> "In cases of this character it is frequently said that the drawer of the instrument has a double intent: (1) He intends to make the instrument payable to the impostor with whom he deals; and (2) he intends to make it payable to the person whom he believes the impostor to be. By the great weight of authority the first is held to be the controlling intent, although a different view has been taken in some cases where the payee named was known to the drawer, or where the payee was particularly identified in the instrument as by some description or title."

This court also pointed out in the *Security-First National Bank* case that the majority rule is that where the drawer delivers a check, draft, or bill of exchange to an impostor as payee, supporting that he is the person that he has falsely represented himself to be, the impostor's endorsement in the name by which the payee is described is regarded as a genuine endorsement to subsequent holders in good faith.

In the *National Metropolitan Bank* case, it is perfectly obvious that the disbursing agent in delivering the checks to Foley did not intend that Foley should endorse same. In the case at bar, it is just as perfectly obvious that the government in delivering the checks to the payee in the name signed on the return and at the address given on the return intended that the person who filed the return get the refund check and endorse same, which is exactly

what happened. Here in the case before the court, the checks were intended to go, as they did, to the very flesh and blood person who filed the return as payee though that intention was procured by fraudulent representations as to the payee's name and status. The checks were delivered to the person filing the return and were intended for that person and though they were voidable for fraud, the person receiving the checks was the payee. (*United States v. Continental American Bank & Trust Co.,* 175 F. 2d 271 (C. A. 5, 1949).)

Continental National Bank and Trust Co. v. Olney National Bank, 33 F. 2d 437 (C. A. 7, 1929); *First National Bank v. Whitman,* 94 U. S. 343 (1876); *Leather Manufacturers' Bank v. Merchants Bank,* 128 U. S. 26 (1888); Brannan's Negotiable Instruments Law (7th Ed., 1948), p. 445, all cited by appellant on page 10 of its brief, simply state the general proposition of law that the drawee bank is liable to the drawer when the drawee pays on a forged endorsement because it has not followed the order of its depositor. They have no application to the facts of the case at bar.

The case of *Washington Loan & Trust Co. v. United States,* 134 F. 2d 59 (C. A. D. C. 1943) cited by appellant on page 12 of its brief has no application to the case at bar for the same reason that the *National Metropolitan* case does not apply. In the *Washington Loan & Trust Co.* case, one Stitley was an employee of the Park Service. His duty was to prepare bi-monthly payroll vouchers, containing names of employees in service, present them to the disbursing officers of the Government, and receive and distribute the checks drawn by those officers to the order of the employees. It was not intended by the Government that Stitley, who prepared the false vouchers, was to be the payee of the checks. It was in-

tended that he, as was his duty, would send them to the named payees. In the present case it was intended by the Government that the person who prepared and filed the return showing the overpayment be the one to receive the check and endorse same.

In *Onondaga County Savings Bank v. United States,* 64 Fed. 703 (C. A. 2, 1894), cited on pages 12 and 16 of appellant's brief, the impostor rule was not discussed. Furthermore, it does not appear from the facts of the case whether the original dealings had been between an impostor or not. There is at least an inference from appellant's brief, page 17, that the original dealings were genuine between an actual person named Alma Wood, who was entitled to a pension check, and the Government, so that the drafts issued by the Government were intended by the Government to go to the real Alma Wood, with whom the original dealings took place before the impostor came into the picture.

In *United States v. National Exchange Bank of Providence,* 214 U. S. 302 (1909), cited on page 18 of appellant's brief, there are no facts stated in the case to show that Munson, the person who got the checks and forged the names of the payees, was the one who filed the false pension vouchers. This fact is pointed out in *United States Continental American Bank and Trust Co.,* 175 F. 2d 271 (C. A. 5, 1949) wherein the court at page 272, referring to the *United States v. National Exchange Bank of Providence* case said:

> "He had not passed himself off as a person entitled to a pension and had not been found entitled to a check. He was not an impostor but a common forger. The court did not refer to the 'impostor rule.'"

In the case at bar, it is stipulated that the person representing himself to be entitled to the refund is the one who got the refund and endorsed the check. True, he had committed fraud and the transaction was voidable but had anyone else endorsed the check it would have been a forgery. The only person in the present case who could endorse or had authority to endorse and who the government intended should endorse was the person who filed the return and did endorse.

None of the cases cited by appellant in its brief beginning on page 19 and ending on page 20 involved the impostor doctrine. They involve fictitious payees under the bearer paper rule. Only two cases mentioned the impostor rule: *Commonwealth v. Globe Indemnity,* 323 Pa. 26, 185 Atl. 796 (1936) and *McCornack v. Central State Bank,* 203 Iowa 833, 211 N. W. 542 (1926), and they both point out that if a particular person is intended and designated as payee, it is immaterial to the drawer by what name he is called, he may endorse and payment to him will be good. The facts of the *Commonwealth* case are not at all analogous to the case at bar.

The *Clearfield Trust Co. v. United States,* 318 U. S. 363 (1943) case is not an impostor case and the rule is not discussed.

It should perhaps be stated in passing that counsel for appellant on more than one occasion in his brief, states that the swindlers in the present case obtained the checks from the mail by means not shown. Appellee cannot agree with this statement. The stipulation of facts shows how they were obtained [R. 16].

B. The Policy of the National Metropolitan Bank Case Is Not Applicable to the Case at Bar.

On page 22 of appellant's brief under the heading "B. The Policy of the National Metropolitan Bank Case has Application to the Facts of the Present Case," the appellant makes the statement that "Strong considerations of policy support the almost universal rule, which was followed by the Supreme Court in the National Metropolitan Bank Case, that the drawer owes no duty to protect one who voluntarily cashes a check against a forgery of the payee's signature and consequently the one cashing the check will not be relieved of his guaranty of prior endorsements on the sole ground that the check was fraudulently procured from the drawer by the forger."

The appellant then on page 23 cites *Clearfield Trust Co. v. United States,* 318 U. S. 363, 370 (1943) for the proposition that if the payee's endorsement is forged and loss occurs, it is the "neglect or error" of the cashing or collecting bank in "accepting the forger's signature which occasions the loss," unless the drawer's lack of precaution has made it impossible as a practical matter for the bank to discover the forgery.

Appellee has no argument with appellant concerning what the policy is or should be where admittedly there is a forgery and the endorsement is guaranteed. However, what appellant in effect is attempting to argue is that the same policy should be applied in determining whether or not there is a forgery as is applied when there is an admitted forgery. This simply begs the question.

Where it is an admitted forgery, no title passes to a transferee and one who guarantees such an endorsement has breached his contract of guaranty which gives rise to the cause of action. Whether or not there may have

been an initial fraud in the procurement and issuance of the instrument would in no way change the result if there is an admitted forgery. But the policy which permits recovery where there is an admitted forgery cannot be used or applied to determine the very question in issue as to whether or not there is a forgery.

That the policy of the *National Metropolitan Bank* case should not be applied to the facts of the case at bar is amply illustrated in the *United States v. Continental American Bank and Trust Co.* case, *supra,* a case on all fours with the case at bar, wherein the court pointed out that all the bank's guaranty is that the person to whom the check was issued has endorsed it, but not that the check was honestly procured from the drawer. The banks, by their guaranty, do not have the burden of correcting a mistake or detecting a fraud committed.

To argue that the same policy which gives relief in the case of an admitted forged endorsement should be applied to determine whether or not there is a forgery is akin to arguing that the measure of damages which is applied in a negligence case should be used to determine whether or not there is negligence.

Appellant argues that one who pays money out on a check is not concerned with the circumstances of its issuance which are not known to him, nor with what precaution against forgery the drawer may have taken before or after executing the check. That is a fair statement and in accord with the opinion in the *United States v. Continental American Bank and Trust Co.* case that the bank by guaranteeing the endorsement does not warrant that the check was not fraudulently procured. But the appellant nevertheless conversely argues in effect that if the check is fraudulently procured that *ipso facto* that

makes the endorsement a forgery and, therefore, the bank is liable on its guaranty. There is no logic whatsoever to such reasoning.

Though appellant does not say so in so many words, its entire argument, pages 22 to 27, boils down to nothing more or less than an attempt to argue that where government checks are concerned, there is no such thing as the "Impostor Rule."

Investigation has revealed that in the case of the *United States v. Continental American Bank and Trust Co., supra,* in which certiorari was denied in 338 U. S. 870 (1949), the Government's brief, in support of its petition for certiorari under the heading "Questions Presented," appears the following, "3. Whether the so-called 'Impostor Rule' can apply at all to a check issued by the United States." The Government relied heavily on the *National Metropolitan Bank* case and on the *United States v. National Exchange Bank of Providence,* 214 U. S. 302 (1909) case and under the heading of "Reasons for Granting Writ of Certiorari" argued that (a) the court refused to follow the controlling decisions of the Supreme Court in the *National Metropolitan Bank* and the *Exchange Bank of Providence* cases; (b) that the so-called impostor rule has no application in the case of Government checks. Thus, the Supreme Court had before it the question of whether the decision of the Court of Appeals in the *Continental American Bank and Trust Co.* case was contrary to the *National Metropolitan* case and also the question of whether or not the court should limit the impostor rule application so that it did not apply to Government checks. There was thus presented to the Supreme Court in the petition for certiorari in the *National Metropolitan Bank* case, the same argument as presented herein by appellant and certiorari was denied.

In the *Continental Bank and Trust Co.* case, a woman whose true name was Bertha Smith but using the name of Beulah Mitchell Gibbs, who was the widow of Ben Gibbs, Jr., a deceased veteran, and pretending to be Beulah Mitchell Gibbs, by application sent through the mail to the Veteran's Administration, secured Veteran's Administration allowances to her as the widow. The Veteran's Administration sent to her through the mail checks made out to Beulah Mitchell Gibbs as payee. Upon receipt of these checks, Bertha Smith endorsed the name of Beulah Mitchell Gibbs on the checks and cashed same at the defendant bank, which bank then placed its own endorsement thereon with the additional notation "prior endorsements guaranteed" and collected on the checks from the United States. It will thus be seen from an examination of the facts that in all essential elements, the case is identical to the case at bar and certiorari was denied. As a matter of fact, the case at bar presents an even stronger case for the application of the impostor doctrine as it could very well have been argued in the *Continental Bank* case that the Government intended that the checks should be endorsed by "Beulah Mitchell Gibbs, widow of Ben Gibbs, Jr.," in which case only the true Beulah Mitchell Gibbs could have endorsed. In the case at bar, the appellant does not even have that to support its case.

The case of *United States v. First National Bank of Albuquerque,* 131 F. 2d 984 (C. A. 10, 1942) is a case similar in facts to the case at bar and in which case it was held that the impostor rule applied. Petition for certiorari was denied in 318 U. S. 774 (1943). The Court of Appeals at page 987 said:

> "It must be conceded however that when the United States becomes a party to commercial paper, it impliedly consents to be bound by the same rules gov-

erning private persons under the same circumstances. Cooke v. United States, 91 U. S. 389, 23 L. Ed. 237; United States v. National Exchange Bank of Baltimore, 270 U. S. 527, 46 S. Ct. 388, 70 L. Ed. 717; Lynch v. United States, 292 U. S. 571, 579, 54 S. Ct. 840, 78 L. Ed. 1434; United States v. Guaranty Trust Company, 293 U. S. 340, 350, 55 S. Ct. 221, 79 L. Ed. 415, 95 A. L. R. 651; United States v. First National Bank of Prague, 10 Cir., 124 F. 2d 484. Whatever label we give the rule, whether Federal or state law, it derives its substance from the law merchant, and since New Mexico has not spoken on the question, we are at liberty to assume that its courts as well as the Federal law, will follow the uniform law governing commercial transactions. To that extent, we shall fashion the rule from the 'materials at hand.' "

The court went on at page 987 to say, quoting from its prior decision in the case of *United States v. First National Bank of Prague,* 124 F. 2d 484 (C. A. 10, 1941):

" 'With few exceptions, it is held that the drawer of a check, bill of exchange, or other negotiable instrument cannot recover from an intermediary bank on its endorsement, or from the payee bank upon its payment, where the check, bill, or other instrument is drawn and delivered to an impostor under the mistaken belief on the part of the drawer that he is the person whose name he has assumed and to whose order the check, bill, or other instrument is made payable, and the intermediary bank acquires it from the impostor upon his endorsement thereon of the name of the payee, or the payee bank pays it upon such endorsement, as the case may be. Although not in full accord in respect of the reasons for their conclusion, most courts hold that while the drawer acts

> in the mistaken belief that the person with whom he deals either in person or by correspondence is the person whose name he has assumed and pretends to be, still it is the intent of the drawer to make the check, bill, or other instrument payable to the identical person with whom he deals and therefore to be paid on his endorsement; and that accordingly payment to him or his endorsee merely affectuates the intent of the drawer.' "

In the Government's brief in the *First National Bank of Prague* case, in support of its petition for certiorari, the Government's question was whether or not the impostor rule applied to prevent recovery by the United States. As stated before, the petition for certiorari was denied. Thus, on two occasions; one before the *National Metropolitan* case and one subsequent, there has been presented to the Supreme Court the points argued for by appellant herein and in both instances certiorari was denied.

II.

The Impostor Rule Is Applicable to the Present Facts.

In support of appellee's argument herein that the impostor rule is applicable to the facts of the present case, appellee believes that it is appropriate at this point to summarize briefly the facts as set forth in the Stipulation of Facts [R. 14-17]. On the date set forth in Paragraph I of the Stipulation of Facts, seven checks were issued by the Treasurer of the United States in the names of the payees as set forth in the stipulation. Prior to the issuance of the checks, one or more persons, whose identity

is unknown, filed income tax returns in the names in which the aforementioned checks were issued, showing overpayment of income tax. Upon receipt of said returns, without first ascertaining whether the taxes claimed to have been paid to appellant had been paid and relying on the returns which were false and fraudulent, appellant issued the seven checks hereinbefore referred to. Appellant then mailed the seven respective checks to the respective payees in the names of the payees as shown on the returns and to the addressees shown on the returns. Each check was endorsed by the same person who signed the return in the name signed on the return for which the check was issued. Each check was subsequently endorsed to appellee, endorsed by appellee "All prior endorsements guaranteed."

Stated generally, the impostor rule is that where the drawer delivers a negotiable instrument to an impostor as payee, supposing that the impostor is the person he has falsely represented himself to be, the impostor's endorsement is regarded as a genuine endorsement, not a forgery, as to subsequent holders in good faith. (*Security-First National Bank of Los Angeles v. United States,* 103 F. 2d 188 (C. A. 9, 1939); *Atlantic National Bank of Jacksonville v. United States,* 250 F. 2d 114 (C. A. 5, 1957).) The fact that negotiations are by mail rather than by person does not change the result. There is no distinction made between the effect to be given an impersonation by mail and one in person. (See *Security-First National Bank of Los Angeles v. United States,* 103 F. 2d 188 (C. A. 9, 1939); *United States v. Continental American Bank and Trust Co.,* 175 F. 2d 271 (C. A., 5, 1949); Britton on Bills and Notes (1943), pp. 715-725.)

A. United States v. Continental American Bank and Trust Co. and Related Cases Are Controlling.

The basis for the impostor rule is that the intent of the drawer was carried out; *i.e.,* the person who the drawer intended should endorse the check did endorse. (*Security-First National Bank of Los Angeles v. United States, supra; United States v. First National Bank of Prague, supra; United States v. First National Bank of Albuquerque, supra.*)

The facts herein present the classic situation for the application of the impostor rule:

1. Fraud practiced on the drawer by an impostor which induces the drawer to deal with same.

2. Such dealing is consummated by the issuance and delivery of a check by the drawer.

3. The check is issued to the impostor in his assumed name.

4. It was intended that the impostor receive the check and did receive same.

5. It is intended that he endorse the check and did endorse same.

Appellant in Foot Note No. 15, page 28 of brief makes the statement that the Supreme Court has never examined the impostor rule. Appellee does not believe that this is an accurate statement. There may be no Supreme Court decision on the impostor rule; however, the Supreme Court has certainly examined the rule.

It is pointed out herein, *supra,* that in two cases, *United States v. Continental American Bank and Trust Co.,* 175 F. 2d 271 (C. A. 5, 1949) and *United States v. First National Bank of Albuquerque,* 131 F. 2d 984 (C. A. 10,

1942), the impostor rule was the issue involved. In both cases the Government petitioned for certiorari and in both cases, it was denied. (338 U. S. 870 (1949); 318 U. S. 774 (1943) respectively.) We certainly may assume that the Supreme Court, before denying certiorari, examined the impostor rule as it was applied in both cases. We may further assume that in denying certiorari in both cases, the Supreme Court at least tacitly approved both decisions of the Court of Appeals.

The *United States v. Continental American Bank and Trust Co.* case, as pointed out *supra* herein, is indistinguishable in its essentials from the case at bar and as certiorari was denied in that case, subsequent to the *National Metropolitan Bank v. United States* case, the *Continental American Bank and Trust Co.* case is the leading authority for appellee's argument that the impostor rule is applicable to the facts of the case at bar and also that the *National Metropolitan Bank* case has no application to the facts of the case at bar, either in principle or fact.

It is further submitted that *Security-First National Bank of Los Angeles v. United States,* 103 F. 2d 188 (C. A. 9, 1939), *supra; United States v. First National Bank of Prague,* 124 F. 2d 484 (C. A. 10, 1941); *United States v. First National Bank of Albuquerque,* 131 F. 2d 985 (C. A. 10, 1942; and *Atlantic National Bank of Jacksonville v. United States,* 250 F. 2d 114 (C. A. 5, 1957), are all authority, both in fact and principle, that the case at bar presents the classic situation for the impostor rule and that the decision of the trial court herein was correct.

B. The Doctrine of Actual Intent Is the Correct Basis for Application of the Impostor Rule.

As pointed out *supra* herein, the basis for the application of the impostor rule is that the bank in paying the check has carried out the drawer's intent. (*United States v. First National Bank of Prague,* 124 F. 2d 484 (C. A. 10, 1951); *Security-First National Bank of Los Angeles v. United States,* 103 F. 2d 188 (C. A. 9, 1939); *United States v. First National Bank of Albuquerque,* 131 F. 2d 985 (C. A. 10, 1942); *Land Title and Trust Co. v. Northwestern National Bank,* 196 Pa. 230, 46 Atl. 420 (1900); Britton Bills and Notes (1943), p. 724.)

There can be no question but that a drawer in issuing a check in a certain name intends that some physical being endorse the check, he had some physical being in mind, not just a name, unless he intended that the payee be a fictitious or non-existing person in which case it is bearer paper and needs no endorsement.

Appellant argues (B. 33) that there is no need to look beyond the face of the instrument for the purpose of ascertaining the drawer's intent. That this is absolutely an unworkable test may be pointed out by example. Let us assume that a check is made payable to "John Smith." Assume there are several John Smiths. Then any John Smith who came into possession of the check could endorse and the endorsement would not be a forgery because, according to appellant's argument, we must look at the face of the instrument only and it is not necessary to ascertain which John Smith was intended or in the mind of the drawer when he drew the check. In other words, as we should not look beyond the instrument, according to appellant, then the drawer must have intended

the check to be payable to a name only, not any particular physical person. Appellee can find no logic in such a test.

Appellant points out (B. 32) that Judge Rives in his dissent in the *Atlantic National Bank* case, asserted that the impostor rule "introduces confusion requiring the ascertainment of a non-existent intent." (250 F. 2d 120.) We respectfully submit that this is an unrealistic approach. There must of necessity exist an intent in the issuance of every check, otherwise it would not have been issued. Again, for example, let us assume that a person is doing business under a fictitious name. Suppose a return is filed by that person in the fictitious name showing an overpayment and a refund due. Assume further that there actually is an overpayment and a refund due. The Government issues a check for the amount of the refund in the fictitious name and it is endorsed by the person entitled to the refund in the fictitious name. If we follow appellant's argument that we look to the face of the instrument only, then the endorsement would be a forgery but there can be no question but in the example that the physical person who endorsed was the one intended by the Government to endorse, although he did not endorse in his true name. In other words, the drawer is not interested in a name but in a particular physical person. (*Commonwealth v. Globe Indemnity,* 323 Pa. 261, 185 Atl. 796 (1936); *McCornack v. Central State Bank,* 203 Iowa 833, 211 N. W. 542 (1926).) The only difference between the example and the case at bar is that in the example, the payee was using a fictitious name for a legitimate reason or purpose and in the case at bar, he was using it for a fraudulent purpose. Actually, all the appellant's argument amounts to in attempting to reject the actual intent doctrine is that because it was defrauded, the endorsement was a forgery, whereas if there had not been a fraud in the

issuance of the check, it would not be a forgery. In other words, the appellant, in effect, says liability depends on whether or not there was fraud which induced the issuance of the check. The banks, in guaranteeing prior endorsements, do not warrant or guaranty that the check was not fraudulently issued. (*United States v. Continental American Bank and Trust Co.,* 175 F. 2d 271 (C. A. 5, 1949).)

The foregoing examples, we believe, clearly demonstrate that actual intent is the true basis for the impostor doctrine. In the case at bar, the Government in issuing the checks was not at all concerned with the names. It was only interested in sending a refund to the physical person filing the return and who it thought was entitled to a refund. It intended that the check be payable to the physical person filing the return, not just to a name. Otherwise, if it only intended a name, then any person with that name could endorse. Obviously, that is not what the Government intended.

Appellant cites cases in which the impostor rule has been applied and in which cases under the factual situation existent, either the cashing party had actual knowledge of the drawer-impostor dealings or cases in which the impostor would have been identified as the payee, even if reasonable inquiry had been made. However, a reading of those cases discloses that such a factual situation is not a condition to the application of the rule. The various decisions state what the impostor rule is and do not condition its application upon the existence of the facts mentioned. They are practically unanimous in simply stating that the rule is based on the intent of the drawer and that he intended the impostor endorse the check.

Conclusion.

It is respectfully submitted that the decision of the trial court was correct and that the judgment should be affirmed.

Respectfully submitted,

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GEO. L. BECKWITH,
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